IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

THURSDAY, THE 24TH MAY 2007 / 3RD JYAISHTA 1929

SA.No. 618 of 1993(F)

AGAINST THE DECREE AND JUDGMENT IN AS.159/1990 of SUB COURT,THALASSERY
AGAINST THE DECREE AND JUDGMENT IN OS.381/1987 of MUNSIF COURT, KUTHUPARAMBA .

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APPELLANTS/ RESPONDENTS 2TO 9.

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1. **CHODON PUTHIYOTH SHYAMALAVALLI AMMA, D/O.GOVINDAN NAMBIAR, AGED 43 YEARS, KEEZHALLUR AMSOM, PALAYODE DESOM THALASSERY TALUK.**
2. **SON -DO- ANILKUMAR, AGED 23 YEARS, RESIDING AT -DO- -DO-**
3. **SISTER, DO- AJITHAKUMARI, AGED 20, RESIDING AT -DO-**
4. **SISTER -DO- PRASEETHA, RESIDING DO.**
5. **PERINGALI NARAYANI AMMA, AGED 72, CHIRIKANDOTH HOUSE, CHAVASSERY AMSOM, ULIYIL DESOM.**
6. **THATTATHIL MARY, D/O.MATHAI, AGED 43, CHAVASSERY AMSOM, ULIYIL DESOM.**
7. **DAUGHTER SUMA, AGED 23, RESIDING DO-**
8. **BROTHER SUTHAN, AGED 20, RESIDING DO. DO.**

BY ADV. SRI T A RAMADASAN, A K ALEX

RESPONDENTS/ PLAINTIFF/ 1ST RESPONDENT.

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1. **KAVALAM JISHA, D/O.PADMANABHAN NAMBIAR, AGED 11 YEARS, (MINOR) BY NEXT FRIEND SRI.GOVINDA KURUP, CHAVASSERY AMSOM, ULIYIL DESOM.**
2. **KAVALAM OMANA AMMA, D/O. ACHUTHA KURUP, AGED 36, CHAVASSERY AMSOM, ULIYIL DESOM.**

BY ADV. SRI V . SIVASWAMI-R1, V .V. ASOKAN, SRI K I MAYANKUTTY MATHER - R2

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 24 /05 / 2007 , THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR, J.

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S.A.No. 618 OF 1993

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DATED THIS THE 24th DAY OF MAY, 2007

JUDGMENT

Whether an illegitimate child is entitled to a share in the property of his father is the interesting question to be decided in the appeal.

2. Peringali Padmanabhan Nambiar was a document writer. He married first appellant/second defendant in 1966. Appellants 2 to 4 who are defendants 3 to 5 were born in that wedlock. Fifth respondent who was the sixth defendant is the mother of Padmanabhan Nambiar. Appellants 6 to 8 are the assignees of the properties from appellants 1 to 5. First respondent is the daughter of second respondent who was the first defendant in the suit. According to respondents, Padmanabhan Nambiar married second respondent on 21.6.1975 at her residence and first respondent was born in that wedlock on 8.10.1976. It was contended that plaint schedule properties which originally belonged to deceased Padmanabhan Nambiar on his death devolved on appellants 1 to 5 and respondents being his legal

heirs and each of them is entitled to a share. First respondent instituted the suit seeking separation of her share. Second respondent in the written statement also claimed her share of the property contending that she is the legally wedded wife of Padmanabhan Nambiar. She also contended that the marriage of Padmanabhan Nambiar with first appellant was not in accordance with the custom and therefore she is not entitled to a share. Appellants in their written statement contended that there was no marriage between Padmanabhan Nambiar and second respondent and second respondent is not the legally wedded wife of Padmanabhan Nambiar and is therefore not entitled to any share. It was also contended that first respondent is not the legitimate daughter of Padmanabhan Nambiar and therefore she is not entitled to a share as the legal heir of deceased Padmanabhan Nambiar. It was therefore contended that respondents are not entitled to any share in the plaint schedule properties. Learned Munsiff, on the evidence of Dws 1 and 2 and Exts.A1 and A2 and B1 to B8, dismissed the suit holding that respondents did not establish the marriage between Padmanabhan Nambiar and second respondent and

therefore they are not the legal heirs and are not entitled to any share in the properties. Second respondent did not challenge the decree and judgment rejecting her claim for a share on the basis that she was the legally wedded wife of Padmanabhan Nambiar. First respondent alone filed an appeal (AS 159 of 1990) contending that under Section 16 of Hindu Marriage Act, even if first respondent is an illegitimate child, she is entitled to a share and courts below should have granted her a share.

3. The learned Sub Judge in A.S.159 of 1990, on re-appreciation of evidence, upheld the finding of trial court that there was no marriage between Padmanabhan Nambiar and second respondent. But following the decision of this court in **Janu** V. **Yesoda** (1989(1) KLT 392) it was held that first respondent even though the illegitimate daughter is entitled to a share in the plaint schedule property. A preliminary decree was passed. Second Appeal is filed challenging the said preliminary decree and judgment.

4. The appeal was admitted formulating the following substantial questions of law.

1)Whether the first appellate court was correct in granting a

share to first respondent after holding that there was no solemnisation of marriage between late Padmanabhan Nambiar and second respondent.

2)Whether an illegitimate child is entitled to get a share in the properties of the father under Section 16(1) of Hindu Marriage Act.

4. Learned counsel appearing for appellants and respondents were heard.

5. Learned counsel appearing for appellants argued that having found that there was no marriage between Padmanabhan Nambiar and second respondent and first respondent is not the legitimate child of Padmanabhan Nambiar, first appellate court should not have granted a decree for partition. It was argued that an illegitimate child is entitled to claim a share only if Section 16(1) of Hindu Marriage Act is attracted and to attract Section 16(1) the marriage should have been void as provided under Section 11 and only if the marriage was void under sub-clauses (i), or (iv) or (v) of Section 5, Section 11 is attracted and as both the courts below concurrently found that there was no marriage at all, first respondent is not entitled to a share as

provided under Section 16(1) and therefore the decree and judgment passed by the first appellate court is unsustainable. It was pointed out that as long as first respondent is not a legitimate child, she is not related to deceased Padmanabhan Nambiar as provided under Section 3(1)(j) of Hindu Succession Act and as provided under the proviso to Section 3 (1)(j) she is only entitled to claim a share in the property of her mother and not that of father and therefore the decree is unsustainable.

6. Learned counsel appearing for respondents argued that first respondent is entitled to a share as provided under Section 16(1) of the Hindu Marriage Act. It was argued that Ext.B1 establishes that there was a marriage between Padmanabhan Nambiar and second respondent which was admitted by Padmanabhan Nambiar in Ext.B1 and as first appellant was the wife of Padmanabhan Nambiar living at that time, the marriage is void as provided under Section 5(1) (i) of the Hindu Marriage Act and therefore Section 11 is attracted and hence under Section 16(1) first respondent, even though an illegitimate daughter, is entitled to a share. Learned counsel also argued that apart from the admission of

Padmanabhan Nambiar in Ext.B1, evidence of second respondent as DW1 establishes that there was a customary marriage between Padmanabhan Nambiar and second respondent and therefore finding of first appellate court that appellant is entitled to a share is perfectly correct and warrants no interference.

7. Though respondents the plaintiff and first defendant contended that Padmanabhan Nambiar had married second respondent and there was a customary marriage between them on 21.6.1975, appellants 1 to 5 disputed that fact and specifically contended that there was no marriage between Padmanabhan Nambiar and second respondent. Hence it is for respondents to establish the alleged marriage. First respondent did not adduce any evidence. It was the second respondent who produced Ext.B1 and examined herself as DW1. The second respondent contended that she is the legally wedded wife of Padmanabhan Nambiar and is therefore entitled to a share. In fact she had gone a step further and contended that marriage between Padmanabhan Nambiar and first appellant was not in accordance with the custom and therefore marriage of first appellant was not a

legal and valid marriage. The learned Munsiff, on the evidence found that there was no marriage between Padmanabhan Nambiar and second respondent at all and second respondent is not entitled to a share. Second respondent did not file an appeal and submitted to the finding of the trial court that there was no marriage between Padmanabhan Nambiar and second respondent. First appellate court also on reappreciation of evidence, confirmed that finding and second respondent did not challenge the finding of the trial court even by filing a cross objection. Therefore in the second appeal, respondents are not entitled to contend that there was a legal marriage between Padmanabhan Nambiar and first respondent. Apart from that legal disability there is absolutely no evidence to prove solemnization of marriage between Padmanabhan Nambiar and second respondent. Though Ext.B1 agreement was relied on, there is no recital in Ext.B1 that executants had undergone a customary marriage. Though it was stated that they have become husband and wife with the consent and permission of the relatives and friends, it was not recited that there was a customary marriage. Apart from the interested

testimony of DW1, no evidence was adduced to prove the alleged marriage. In such circumstances, it can only be held that there was no solemnization of marriage between the second respondent and Padmanabhan Nambiar.

8. True, evidence establish that first respondent was born to second respondent in her relationship with Padmanabhan Nambiar. Therefore it can be held that first respondent is the illegitimate daughter of Padmanabhan Nambiar. The question is whether an illegitimate child is entitled to a share in the property of the father. Learned Sub Judge relied on the decision of a learned Single Judge of this court in Janu's case (supra) and held that first respondent is entitled to a share even though she was an illegitimate child. Facts in Janu's case (supra) show that the marriage was allegedly solemnised in 1959. The learned Single Judge, relying on Section 16 of the Hindu Marriage Act held that the illegitimate child is entitled to a share.

9. Another Single Judge of this court in **Karthi Pankajakshy** V. **Lalitha Sujatha** (1990(1) KLT 248) considered the said decision in the light of the provisions of Hindu Succession Act 1956 and holding that as per Section 3

(j) of Hindu Succession Act related means by legitimate kinship and the marriage considered in Janu's case supra was of 1959 and distinguishing the difference between Section 11 and 12 it was held that an illegitimate child is not entitled to inherit the properties of the father unless the child falls under Section 16 of Hindu Marriage Act.

10. Under Section 8 of Hindu Succession Act the property of a male Hindu dying intestate shall devolve on the relatives provided under class 1 or 2 or the agnates or cognates of the deceased if there is no class I or class II heirs. Under Section 3(1)(j) of Hindu Succession Act "related" means "related by legitimate kinship". In fact to safeguard the rights of the illegitimate children, proviso thereunder was added to the effect that illegitimate children shall be deemed to be related to their mother and to one another and their legitimate descendants shall be deemed to be related to them and to one another. The deeming provision is not extended to the father of the illegitimate children. It is therefore absolutely clear that only a legitimate kinship is a relative, who is entitled to inherit to the properties of a male Hindu, as provided under the Hindu Succession Act. If so an illegitimate

child cannot be a relative under class one, like a legitimate son or daughter.

11. An illegitimate child can claim a share in the property of the father only under Section 16(1) of the Hindu Marriage Act(hereinafter referred to as the Act).

12. Section 16(1) reads:-

> "16. **Legitimacy of children of void and voidable marriages** - (1) Notwithstanding that a marriage is null and void under section 11, any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate, whether such child is born before or after the commencement of the Marriage Laws(Amendment)Act, 1976, and whether or not a decree of nullity is granted in respect of that marriage under this Act and whether or not the marriage is

held to be void otherwise than on a petition under this Act".

13. A reading of Section 16(1) of the Act makes it absolutely clear that an illegitimate child is entitled to inherit to the estate of the father only if the marriage of the parents was null and void as provided under Section 11 of the act.

14. Section 11 of the Act reads:-

"11. **Void marriages**- Any marriage solemnized after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto, (against the other party) be so declared by a decree of nullity if it contravenes any one of the conditions specified in clauses (i), (iv) and (v) of section 5".

15. Therefore to attract Section 11 of the Act, the marriage between the father and mother of the illegitimate child should have been null and void for contravention of any of the conditions specified in clause (i) or (iv) or (v) of

Section 5 of the Act.

16. Clause (i) (iv) and (v) of Section 5 reads:-

> "5. A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely:
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> (i)neither party has a spouse living at the time of the marriage;
>
> ii) XXXXXXXXXXXXXXXXXX
>
> iii)xxxxxxxxxxxxxxxxx
>
> iv) the parties are not within the degrees of prohibited relationship, unless the custom or usage governing each of them permits of a marriage between the two;
>
> v)the parties are not sapindas of each other, unless the custom or usage governing each of them

permits of a marriage between the two.

17. The learned Single Judge in Janu's case (supra) on the facts of that case found that when Gopalan married the mother of the plaintiff in that case, there was a subsisting marriage between Gopalan and the first defendant therein. It was therefore found that Section 5(1) of the Act would be attracted rendering the marriage which the plaintiff claimed as null and void as provided under Section 11 of the Act and so Section 16(1) of the Act applies. The learned Single Judge therefore held that a child born in such circumstances is entitled to be in the same pedestal as legitimate child when it comes to the question of distribution of the patrimony. That decision has no application to the present case as it is not a case where there was a solemnization of marriage, but the marriage was null and void for violation of any of the conditions provided under clause (i) or (iv) or (v) of Section 5 of the Act. The concurrent factual finding was that there was no solemnization of marriage at all. In such a case Section 16 (1) of the Act cannot be applied. Another learned Single Judge in Karthi Pankajakshy's case (supra) considered this question

and held that Section 16(1) will apply only if the marriage was solemnized after the commencement of Hindu Marriage Act and the marriage is void under Section 11 of the Act.

18. In law, in order to attract Section 16(1) of the Act there should have been a solemnization of marriage between Padmanabhan Nambiar and second respondent and that marriage should have been null and void for contravention of any of the conditions specified in clause (i) or clause (iv) or clause (v) of Section 5 as provided under Section 11 of the Act. When on the evidence, courts below found that there was no solemnization of marriage whatsoever between Padmanabhan Nambiar and second respondent, first respondent is not entitled to claim that she is entitled to inherit to the properties of the father as provided under Section 16(1) of the Act. She would have been entitled to a share if there was a solemnization of marriage between Padmanabhan Nambair and second respondent and that marriage was void as provided under Section 11 for the reason that it violated either of the conditions specified in clauses (i), (iv) or (v) of Section 5. When there was no solemnization of marriage at all, Section 16(1) has no

application. Therefore first respondent being an illegitimate daughter is not entitled to a share in the property of her father Padmanabhan Nambiar as found by the first appellate court. The decree and judgment passed by the first appellate court is therefore set aside and it is found that first respondent is not entitled to a share. Appeal is allowed. The decree and judgment passed by first appellate court is set aside and the suit stands dismissed.

M.SASIDHARAN NAMBIAR, JUDGE

lgk/-

M.SASIDHARAN NAMBIAR, J

S.A.618 OF 1993

JUDGMENT

24.5.2007